

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEPHEN ROBINS	:	ORDER
	:	DTA NO. 819929
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 2001 through February 28, 2003.	:	

Petitioner, Stephen Robins, 97 Brookby Road, Scarsdale, New York 10583, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2001 through February 28, 2003.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed August 2, 2004, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Petitioner, who appeared *pro se*, had 30 days, or until September 1, 2004, to respond to the motion but did not do so. On September 23, 2004 the administrative law judge corresponded with both parties as to a matter in issue and extended the Division of Taxation's response date until October 25, 2004, and petitioner's response date to November 30, 2004, which date began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner, Stephen Robins, filed a timely petition with the Division of Tax Appeals protesting the six notices of determination issued to him for additional sales and use taxes for the period March 1, 2001 through February 28, 2003.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Stephen Robins, six notices of determination, dated November 10, 2003, and addressed to petitioner at “97 Brookby Rd., Scarsdale, New York 10583-6910,” indicating his responsibility as an officer or responsible person of Rockwells Restaurant Corporation. The notices bore assessment identification numbers L-023206460-3, L-023206459-3, L-023206458-4, L-023206457-5, L-023206453-9 and L-023206455-7 and asserted sales and use taxes due of \$46,321.87, \$71,918.87, \$49,588.14, \$66,134.53, \$56,115.65 and \$48,887.88, respectively, for tax quarters ended May 31, 2001, November 30, 2001, August 31, 2001, February 28, 2002, February 28, 2003 and August 31, 2002. On each of the six notices, interest and penalties were assessed, and the notices could be further identified by the following certified control numbers: 7104 1002 9730 0257 4857, 7104 1002 9730 0257 4840, 7104 1002 9730 0257 4833, 7104 1002 9730 0257 4826, 7104 1002 9730 0257 4789, and 7104 1002 9730 0257 4802, respectively.

2. On March 18, 2004, petitioner filed a petition with the Division of Tax Appeals in which he protested the six notices of determination, on the basis that “reasonable cause exists for the elimination of all penalties” and “petitioner is a responsible Officer of a corporation that is or will be filing a petition.”

3. Petitioner's address as set forth on his 2001 New York State Resident Income Tax Return, dated May 5, 2003, was "97 Brookby Road, Scaradale¹ [sic] New York 10583," the same address appearing on the subject notices of determination.

4. Notices of determination, such as those issued herein, were computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number.

Each computer-generated notice of determination was predated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The initial printing, signified by the numeric designation across from "Run," was manually changed at the time of mailing by Division personnel to November 12, 2003, to conform to the actual date of mailing of the notices. The notices in issue were originally scheduled to be mailed on November 10, 2003, but were part of a batch of notices that were not mailed until two days later on November 12, 2003.

5. After each notice of determination was weighed, sealed, had postage affixed, was counted and was verified by a random review of the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

¹ The incorrect spelling of "Scarsdale" by one letter is deemed insignificant in this matter.

6. Information regarding the notices of determination issued to petitioner was contained on pages five and six of the CMR. Corresponding to certified control numbers 7104 1002 9730 0257 4857, 7104 1002 9730 0257 4840, 7104 1002 9730 0257 4833, 7104 1002 9730 0257 4826, 7104 1002 9730 0257 4789, and 7104 1002 9730 0257 4802, were notice numbers L-023206460-3, L-023206459-3, L-023206458-4, L-023206457-5, L-023206453-9 and L-023206455-7, respectively, along with petitioner's name and an address, which was identical to that listed on the subject notices of determination. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service ("USPS"), dated November 12, 2003, and the initials of the postal employee, verifying receipt of the items.

7. The last page of the CMR, page 38, contained a preprinted entry of "411" corresponding to the heading "Total Pieces and Amounts Listed." This preprinted entry was manually circled and beneath it was the aforementioned postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the "411" indicated that all 411 pieces listed on the CMR were received at the post office. This number corresponds with the number of items that were noted as delivered to the post office.

8. The facts set forth above in Findings of Fact "4" through "7" were established through the affidavits of Geraldine Mahon and Bruce Peltier. Ms. Mahon was employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Registry Unit of the New York State Department of Taxation and Finance. Mr. Peltier's duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

9. Rockwell's Restaurant Corporation filed timely petitions with the Division of Tax Appeals requesting a hearing to review sales and use tax assessments issued to the corporation for all the tax periods covered by the petition in issue in this matter.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented.

C. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination in issue were mailed to petitioner on November 12, 2003. Specifically, this 38-page document listed certified control numbers with corresponding names and addresses, including petitioner's control numbers, notice of determination numbers,

name and address. All pages of the CMR bore a U.S. Postal Service postmark dated November 12, 2002. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 38 of the CMR and circled “411” on that page to indicate receipt by the post office of all 411 pieces of mail listed thereon. This evidence is sufficient to establish that the Division mailed the subject notices of determination on November 12, 2003. Since the Division has established both the fact and date of mailing of the notices herein, a presumption arises that the notices were delivered or offered for delivery to the taxpayer in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Petitioner has offered no evidence to rebut this presumption.

Thus, the only remaining question is whether, as a matter of law, the Division is entitled to a determination in its favor on the question of whether petitioner filed a timely petition with the Division of Tax Appeals protesting the six notices of determination issued to him for additional sales and use taxes for the period March 1, 2001 through February 28, 2003.

D. Tax Law § 1138(a)(3)(B) provides,

if a determination [of a tax liability] is identical to or arises out of a previously issued determination of tax of the corporation . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.

E. Since petitioner was issued notices of determination which arose out of the sales and use tax liability of Rockwell’s Restaurant Corporation, and the corporation filed timely petitions protesting the same period prior to the petition filed by petitioner, the corporate petitions are deemed to include a protest by the responsible officer, and a separate (timely) petition of his own is not required by law for his protest of the merits to be within the jurisdiction of the Division of

Tax Appeals. Furthermore, the Division's position that petitioner's petition shall be deemed consolidated with the associated corporate petitions is without merit, inasmuch as neither party requested or authorized such consolidation.

F. Accordingly, the Division's Motion for Summary Determination is denied, and a hearing on the merits of the petition will be scheduled before the Division of Tax Appeals in due course.

DATED: Troy, New York
February 3, 2005

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE